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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-114

WILLIAM J. QUIRK and LEON E. WEIN,

Plaintiffs-Appellants,

against

MUNICIPAL ASSISTANCE CORPORATION FOR THE CITY OF NEW YORK, *et al.*,

Defendants-Appellees.

MOTION TO DISMISS OR AFFIRM

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Appellee Louis J. Lefkowitz, Attorney General of the State of New York, intervened in the above-entitled action pursuant to New York Executive Law § 71 with leave of the State Court of Appeals to support the validity of the statutes challenged by the complaint, and here moves pursuant to Rule 16 of the Rules of this Court that the final judgment of the Court of Appeals of the State of New York be affirmed or, in the alternative, that this appeal be dismissed.

Opinion Below

The opinion of the Court of Appeals of the State of New York, dated April 26, 1977, is reported at 41 N Y 2d 644 and is also attached to appellants' Jurisdictional Statement ("J.S.") as pages A1 to A4 of Appendix A.

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

Statutes Involved

This action involves Chapters 168 and 169 of the New York Laws of 1975. Chapters 168 and 169 added Article Ten to the Public Authorities Law (Book 42 of McKinney's Consolidated Laws), constituting the New York State Municipal Assistance Corporation Act, and made related amendments to the Tax Law and State Finance Law.

Question Presented

Did the enactment of the Municipal Assistance Corporation Act impair contract rights of the plaintiff bondholders of the City of New York in violation of Article I, section 10, clause 1 of the United States Constitution?

Statement of the Case

In June 1975, having found that municipalities in the State were having difficulty in marketing their securities to obtain cash for essential services and for debt service on outstanding securities, Public Authorities Law § 3002 (McKinney Supp. 1970-75), the State Legislature created the Municipal Assistance Corporation for the City of New York ("MAC"), a State instrumentality and public benefit corporation, *id.* § 3033. MAC was designed to sell bonds and to pay or lend to the City the funds received from such sales. To finance the operations of MAC, the Legislature suspended the enabling authority given the City to impose a sales tax up to 4%, which was being collected by the State within the City of New York for City purposes, and imposed a 4% sales tax the receipts from

which would first be available, subject to annual appropriation by the Legislature, for the corporate purposes of MAC so long as and to the extent required, the balance to be paid over to the City. Moreover, the Legislature provided that stock transfer tax revenues theretofore transmitted to the City of New York would first be subject to appropriation for MAC if and to the extent that such sales tax revenues proved inadequate. In addition, Chapters 168 and 169 provided for various fiscal controls and reforms in financial management in the City of New York.

The Court may take judicial notice that under the New York State Financial Emergency Act for the City of New York, as amended, adopted in September 1975 (Chapters 868-870 inclusive) in response to New York City's deepening fiscal crisis and imposing a modicum of direct State control over the City's financial plan, and under the Note Moratorium Law adopted in November 1975 (Chapter 875), the right of the City bondholders to prompt payment of interest and principal has been scrupulously respected, *e.g.* Financial Emergency Act § 3 subd. 2, § 8 subd. 3c(i) and d(i), and § 9 subd. 4 and 5(i).

Appellants sue as bondholders of the City of New York, complaining that the creation of MAC unconstitutionally impaired their contract rights. The history of the litigation is summarized at J.S. 19-20.

ARGUMENT

(1)

The Court lacks jurisdiction as appellants can show no injury, hence have no standing and no "case or controversy" is presented for adjudication.

The irony of this action is that on any objective view of the measures which were adopted by the State to relieve New York City's fiscal crisis, it is the noteholders, the jobholders, and the beneficiaries of the City's various

programs who were sacrificed—not the bondholders. Indeed, the noteholders protested in both the State and the Federal courts that the note moratorium was unconstitutional *inter alia* because they were denied equal protection vis-à-vis the bondholders, whose obligations are being fully honored by the City. *Ropico, Inc.* v. *City and MAC; Avins* v. *City,* 415 F. Supp. 577 (S.D.N.Y. 1976); *Flushing National Bank* v. *MAC et al.,* 52 A D 2d 84 (1st Dept. 1976), rev'd on other grounds, 40 N Y 2d 731 (1976).*

A further irony is that MAC alone is responsible for the billions of dollars in cash infused into the City's arteries—at this writing in excess of 4.6 billion since 1975—which has enabled the City to date to avoid bankruptcy.** The alternative to MAC was an uncertain and threatening prospect for bondholders while *per contra* MAC enhanced the City's ability to meet its obligation to its bondholders; this was both its purpose and its effect.

Yet these plaintiffs-appellants, suing as City bondholders, maintain that by creating MAC the Legislature acted unconstitutionally. The proposition is frivolous. Not only is appellants' view of the law erroneous, but also, their action is clearly wanting in the justiciability demanded by Article III.

It is axiomatic that an appeal will not lie to this Court under 28 U.S.C. § 1257 unless the action presents a case or controversy within the meaning of Article III, *Poe* v. *Ullman,* 367 U.S. 497 (1961), and appellants have the requisite standing, *Braxton County Court* v. *West Virginia,* 208 U.S. 192 (1908).

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* The note moratorium was held violative of the "faith and credit" clause of the State Constitution.

** The Seasonal Financing Act of 1975, P.L. 94-143, due to expire June 30, 1978, deals with the City's annual "cash flow" problem; all advances are fully repaid by the end of each fiscal year.

Appellants' position was improved by the creation of MAC. They assert at best a theoretical injury.

The speculative tenor of the complaint, a basis for dismissal under *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), and authorities there cited, raises questions about the motivation of litigants who are not injured in a practical workaday sense. The explanation quite simply is an academic interest. Overlooking for the moment the unpardonable attempted broadening of the issue on this appeal discussed *post,* it is plain that appellants are pursuing a highly personal view of the local finance article of the 1938 New York Constitution which rests on their reading of the record of the constitutional convention and is contrary to all the decisions of the New York courts since the 1938 Constitution became effective.* This is academic in the extreme and is a far cry from presenting a justiciable controversy for this Court.

(2)

The Court lacks § 1257(2) jurisdiction over issues not litigated below.

The State Court of Appeals rightly observed that the case presents a "very narrow issue" (J.S. at A1), namely, whether the State's alleged diversion to MAC of proceeds of the sales tax and stock transfer tax levied in New York City unconstitutionally impaired the rights of City bondholders.

On the way to this Court appellants broadened beyond recognition the issue they purport to present for adjudi-

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* The law was most recently restated in *Wein* v. *City of New York,* 36 N Y 2d 610 (1975), where appellant Wein, suing as a City taxpayer, unsuccessfully challenged on a broad front of issues, re-played in appellants' Jurisdictional Statement, the validity of an act which was a precursor of the MAC statutes.

cation. Asserting that

> "the purchasers of New York City bonds relied upon the fiscal safeguards built into the 1938 State Constitution"

(J.S. 4), they have poured into the Jurisdictional Statement a storehouse of grievances against the State courts' consistent interpretations of the local finance provisions of the 1938 State Constitution, none of which was previously argued in this litigation.

In the State courts appellants argued as City bondholders that they had a contract right to the sales tax revenues. Here they argue that they had a contract right not to have the Legislature create a public corporation which allegedly violates a variety of constitutional provisions concerning, *e.g.*, the freedom of a public authority from the restrictions on municipal debt.

Clearly the appeal must be deemed limited by the record in the State courts. *McGoldrick* v. *Compagnie Generale*, 309 U.S. 430, 434-435 (1940).

(3)

Assuming Article III jurisdiction, summary affirmance is indicated as no substantial question under the Contract Clause is presented warranting plenary consideration by the Court.

A. The alleged contract never existed.

It is elementary that unless appellants can show they had contract rights which were infringed by the enactment of Chapters 168 and 169, it avails them not at all to show, if they can, that the City bondholders' risk of non-payment was increased by the creation of MAC.

The State court's opinion that appellants did not have the contract rights that they claim is entitled to be followed by this Court unless "manifestly wrong" and replete with

"obvious error." *Hale* v. *State Board*, 302 U.S. 95, 101 (1937); also, *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937); *cf. Juidice* v. *Vail*, 97 S. Ct. 1211 (1977).

Moreover, the contract must be clearly, even "unequivocally", expressed before this Court will examine whether an unconstitutional impairment has occurred. *Keefe* v. *Clark*, 322 U.S. 393, 396-7 (1944).

The State court, after posing the question regarding the alleged diversion of tax revenues, examined Article VIII of the State Constitution, the State Constitutional provision relied on by appellants in their pleading,* and concluded from Article VIII and from its opinion in *Flushing Nat'l Bank* v. *MAC*, 40 N Y 2d 731 (1976), both what appellants' contract *was* and what it *was not*. In a unanimous *per curiam* opinion the court declared that

> "There is not, and never has been, an agreement, express or implied, that the revenues of these [sales and stock transfer] taxes be used to repay city bonds." J.S. at A1.

The court pointed out that City bondholders are protected by the City's constitutional pledge of full faith and credit, which it had recently interpreted in *Flushing Nat'l Bank* v. *MAC*, *supra*, 40 N Y 2d at 735, to constitute a double commitment: to pay the obligation punctually when due and to produce funds to make such payment; and that the bondholders are further protected by the constitutional mandate to exceed normal real estate tax limitations if necessary in order to raise sufficient funds to pay debt service. The Article VIII "first revenues" provision, the court said, whereby if a municipality fails to appropriate sufficient sums to pay debt service, the bondholders have a claim on the "first revenues thereafter received," does not give the bondholders the right to insist that any particular

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* The complaint referred only to Article VIII § 2, *ante*.

existing taxes be maintained, but only assures that out of the revenues which are collected, money must be provided to satisfy obligations to the bondholders.

Appellants' contrary reading of the "first revenues" provision is not a natural reading of the text and is inconsistent with their contract as holders of full faith and credit, general obligation bonds. One looks in vain for an unequivocal expression of their alleged contractual rights in the sales and stock transfer tax revenues.

It is self-evident that an appeal under the Contract Clause must fail as the alleged contract did not exist.

B. There was no unconstitutional impairment in any event.

The question whether, if appellants had the contract they claim they had, the alleged impairment would be unconstitutional, merges into the question *ante* whether appellants can show a direct injury which gives them standing to invoke the jurisdiction of this Court.

For the MAC statutes have had both the purpose and effect of strengthening the position of the City's bondholders, including appellants. As we have noted, while certain tax receipts are subject to being appropriated for MAC's corporate purposes, MAC has poured into the City treasury over 4 billion dollars to date and even more important, MAC has been a lifeline to a City struggling for survival, while the alternative was almost surely a default on the bonds.

Thus the creation of MAC, far from impairing the City's bonds, helped to discharge the City's obligation on the bonds.

> "The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation *for the very reason that thereby the obligation is discharged, not impaired.*"

Faitoute Co. v. *Asbury Park,* 316 U.S. 502, 511 (1942) (emphasis added), quoted with approval in *U.S. Trust Co. of New York* v. *New Jersey,* 97 S. Ct. 1505, 1521, 52 L. Ed. 2d 92, 113 (1977).

It is nothing short of outrageous distortion to suggest, as do appellants (J.S. 39-40), that the circumstances in this case bear any resemblance whatever to the facts in *Port of Mobile* v. *Watson,* 116 U.S. 289 (1885), where the legislature stripped the municipality bare of its revenues, leaving an empty cupboard for the bondholders. The alleged contract and its alleged impairment are simply a contrived attempt to bring to the Supreme Court appellants' losing battle with the State Court of Appeals over the meaning of the 1938 State constitutional provisions.

CONCLUSION

For the reasons stated, the appeal should be dismissed or the judgment should be affirmed.

Dated: New York, New York
August 31, 1977

Respectfully submitted,

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